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HAVE WE NEGLECTED THE SHARĪ'AH-LAW DOCTRINE OF MAṢLAḤAH?

MOHAMMAD HASHIM KAMALI

It is a matter of common knowledge that a gap has existed, and widened in recent decades, between the Sharī'ah and statutory legislation. A certain level of divergence between government practices and the established norms of Sharī'ah had existed ever since the beginning of the Umayyad rule (c. 132 A.H/753 A.D) when a change of direction in government policies took place. Political scientists and historians have interpreted this as a transition from *khilāfah* to *mulk*, that is from a religious to a worldly-oriented system of government. The 'ulamā did not welcome this change and became increasingly critical of the departure, on the part of the Umayyad rulers, from the precedent of the early caliphs, the Khulafā' Rāshidūn. The historical background to these developments is complex, and the 'ulamā's disaffection with the government was due to a combination of political, religious and juridical factors.

This essay is not concerned with historical developments and factors which may be held accountable for diversity and discord between the Sharī'ah and state laws. Instead, it will attempt to highlight the possibilities as to how the existing resources of the Sharī'ah could be utilised in order to narrow the gap, between the Sharī'ah and statutory law. With the adoption and prevalence of statutory legislation as an instrument of government in modern times, the gap between the Sharī'ah and statutory law has become entrenched. Hence any measures taken to develop uniformity between the two categories of law will, in my opinion, be piecemeal and gradual.

Among the non-revealed sources of Islamic Law, of which there are many, the doctrine of *maṣlaḥah mursalah* can contribute most in the effort of bringing the ideal closer to the reality. The legal norm of the Sharī'ah can thus accommodate the pragmatist orientations of governments in their administration of justice. The doctrine of *maṣlaḥah* is broad enough to encompass within its fold a variety of objectives, both idealist and pragmatic, to nurture the standards of good government, and to help develop the much needed public confidence in the authority of statutory legislation

in Muslim societies. The doctrine of *maṣlahah* can strike balance between the highly idealistic levels of expectation from the government on the part of the public and the efforts of the latter to identify more meaningfully with Islam. The religious strata of Muslim societies have continued to regard statutory law as a super-imposition on the Shari'ah. The government has accordingly "no right" to impose its own choices on the Divine Shari'ah. This is an untenable attitude which, on closer analysis, is unacceptable to the Shari'ah itself. The Shari'ah has in many ways become a utopia in the eyes of the uninformed.

Maṣlahah as a proof of Shari'ah, although recognised and incorporated into the legal theory of *uṣūl al-fiqh*, has never been made fully operational. *Maṣlahah* in order to be effective needs to be given the credibility that it deserves. The reluctance on the part of the *ulamā* to acknowledge the full significance of *maṣlahah*, despite the textual and rational evidence in its favour, has meant that *maṣlahah*, has remained very much on the fringes of legal theory. I believe that in *maṣlahah* lies the seeds of the future of the Shari'ah and its viability as a living force in society. Its vast potentials can be utilised only if the lingering skepticism concerning its authority could be discarded. An adequate understanding of the objectives of the Shari'ah and its potential for adaptation would, in my view, remove many of the misconceptions regarding the relationship of the Shari'ah with statutory legislation.

Our discussion of the doctrine of *maṣlahah* would show the common grounds and objectives between the Shari'ah and statutory law, which encourage the prospects of harmony and intergration between them. For after all, one only needs to be reminded that *tawhīd*, that is belief in the oneness of God, which lies at the root of many a principle of Shari'ah law, encourages intergration and rejects artificial boundaries between the various spheres of human personality and life.

Literally *maṣlahah* means public good; when it is qualified as *maṣlahah mursalah*, it refers to unrestricted public interest in the sense of not having been regulated by the Lawgiver and no textual authority can be found on its validity or otherwise.¹ It is synonymous with *istislāh*, and is occasionally referred to as *maṣlahah mutlaqah* on account of its being undefined by the established rules of the Shari'ah. To al-Ghazālī, *maṣlahah* consists of considerations which secure a benefit or prevent a harm but are, in the meantime, harmonious with the objectives (*maqāṣid*) of the Shari'ah. These objectives, the same author adds, consist of protecting the five essential values, namely religion, life, intellect, lineage and property. Any measure which secures these values falls within the scope of *maṣlahah*, and anything which violates them is *mafsadah* (evil), and preventing the latter is also *maṣlahah*.²

More technically, *maṣlaḥah mursalah* is defined as a consideration which is proper and harmonious (*wasf munāsib mulā'im*) with the objectives of the Lawgiver, it secures a benefit or prevents a harm; and the Shari'ah provides no indication as to its validity or otherwise.³ The Companions, for example, decided to issue currency, to establish prisons, and to impose tax (*Kharāj*) on agricultural lands in the conquered territories despite the fact that no textual authority could be found in their favour.⁴

The 'ulamā are in agreement that *istislāh* does not constitute a proof in devotional matters (*'ibādāt*) and in respect of specific injunctions of the Shari'ah (*muqaddarāt*). Thus the *nuṣūṣ* regarding the prescribed penalties (*ḥudūd*) and penances (*kaḥḥarāt*), the fixed entitlements in inheritance (*ḥarā'id*), the specified periods of *'iddah* which the divorced women must observe and such other *aḥkām* which are clear and decisive fall outside the scope of *istislāh*. Since the precise values and causes of *'ibādāt* cannot be ascertained by human intellect, *ijtihād*—be it in the form of *istislāh*, juristic preference (*istiḥsān*) or *qiyās*—does not apply to them. Furthermore, with regard to *'ibādāt* and other clear injunctions, the believer is duty-bound to follow them as they are. But outside these areas, the majority of 'ulamā have validated reliance on *istislāh* as a proof of Shari'ah in its own right.⁵

Istislāh derives its validity from the norm that the basic purpose of legislation (*tashrī'*) in Islam is to secure the welfare of the people by promoting their benefits or by protecting them against harm. The ways and means which bring benefit to the people are virtually endless. The *maṣāliḥ* (pl. of *maṣlaḥah*), in other words, can neither be enumerated nor predicted in advance as they change according to time and circumstances.⁶ To enact a law may be beneficial at one time and harmful at another; and even at one and the same time, it may be beneficial under certain conditions, but prove to be harmful in other circumstances. The ruler and the *mujtahid* must therefore be able to act in pursuit of the *maṣāliḥ* as and when they present themselves.⁷

The majority of 'ulamā maintain that *istislāh* is a proper ground for legislation. When the *maṣlaḥah* is identified and the *mujtahid* does not find an explicit ruling in the *nuṣūṣ*, he must act in its pursuit by taking the necessary steps to secure it. This is justified by saying that God's purpose in revealing the Shari'ah is to promote man's welfare and to prevent corruption in the earth. This is, as al-Shāṭibī points out, the purport of the Qur'ānic *āyah* in Sūrah al-Anbiyā' where the purpose of the prophethood of Muḥammad is described in the following terms: "We have not sent you but a mercy for all creatures." (21:107). In another passage, the Qur'ān describes itself "O mankind, a direction has come to you from your Lord, it is a healing for the ailments in your hearts..." (10 : 75). The message here transcends all barriers that divide the humanity; none must stand in the way of seeking mercy and beneficence to human beings. Elsewhere God Almighty describes

his purpose in the revelation of religion in that it is not within His intention to make religion as a means of imposing hardship (22:78). This is confirmed elsewhere in sūrah al-Mā'idah where we read, in more general terms, that "God never intends to impose hardship" (5:6) upon people.⁹

These are some of the Qur'ānic objectives which grasp the essence of *maṣlahah*; they are permanent in character and will be frustrated if they were to be subjected to the kind of restrictions that the opponents of *maṣlahah* have proposed. We shall discuss the views of the opponents of *maṣlahah* in fuller detail, suffice it to point out here that the argument they have advanced amounts to a proposition that the general objectives of the Qur'ān can only be implemented, in regards to particular cases, if there is another *nass* available in their support. This would seem to amount to an unwarranted restriction on the general objectives of the Lawgiver as are expounded in the Qur'ān.

The 'ulamā have quoted a number of *ahādīth* which authorise acting upon *maṣlahah* although none is in the nature of a clear *nass* on the subject. Particular attention is given, in this context, to the Ḥadīth which provides that "harm is neither inflicted nor tolerated in Islam."⁹ The substance of this Ḥadīth is upheld in a number of other *ahādīth* and it is argued that this Ḥadīth encompasses the essence of *maṣlahah* in all of its varieties.¹⁰ Najm al-Dīn al-Ṭufī, a Ḥanbalī jurist (d. 716 A.H.) has gone so far as to maintain, as we shall elaborate later, that this Ḥadīth provides a decisive *nass* on *istislāh*.

ʿĀ'ishah, is reported to have said that "the Prophet did not choose but the easier of the two alternatives so long as it did not amount to a sin."¹¹

According to another Ḥadīth, the Prophet is reported to have said that "Muslims are bound by their stipulations unless it be a condition which turns a *ḥarām* into a *ḥalāl* or a *ḥalāl* into a *ḥarām*."¹² This would seem to be granting Muslims the liberty to pursue their benefits and to commit themselves to that effect provided that this does not amount to a violation of the explicit commands and prohibitions of the Sharī'ah.

In yet another Ḥadīth, the Prophet is quoted to have said that "God loves to see that His Concessions (*rukhas*) are observed in the same way that His Strict laws (*'azā'im*) are obeyed."¹³

This would confirm that no unnecessary rigour in the enforcement of the *ahkām* is recommended, and that the Muslims should avail themselves of the flexibility and concessions that the Lawgiver has granted them and to utilise such in pursuit of their *maṣāliḥ*. The rigorous approach that the *Zāhirī* 'Ulamā' have taken in regards to *maṣāliḥ*, as will be discussed, later tends to oppose the purport of this Ḥadīth.

Technically, however, the concept of *maṣlahah mursalah* does not apply to the rulings of the Prophet: When there is a Prophetic ruling in favour of a *maṣlahah*, it becomes part of the established law, hence no longer a *maṣlahah mursalah*. From an historical vantage, the notion of *maṣlahah mursalah* originates in the practice of the Companions. This is, of course, not to say that the Prophet has not ruled in favour of *maṣlahah* but merely to point out that as a principle of jurisprudence, *maṣlahah mursalah* does not apply to the rulings of the *Sunnah*.

The practice of the Companions, the Successors and the leading *mujtahidūn* of the past tends to suggest that they enacted laws and took measures in pursuance of *maṣlahah* despite the lack of textual authority to validate it. Caliph Abu Bakr, for example, collected and compiled the scattered records of the Qur'ān in a single volume; he also waged war on those who refused to pay the *zakāt*; and he nominated 'Umar to succeed him.¹⁴ Similarly, 'Umar b. al-Khaṭṭāb held his officials accountable for the wealth they had accumulated in abuse of public office and expropriated such wealth. He also poured away the milk in which water was added as a punishment to deter dishonesty in trade. Furthermore, 'Umar suspended execution of the prescribed punishment for theft in the year of the famine, and he approved of the views of the Companions to execute a group of criminals for the murder of one person.¹⁵ These decisions were taken despite the clear ruling of the Qur'ān concerning retaliation (*qisās*) which is "life for life" and the Qur'ānic text on the imputation of the hand which was not qualified in any way whatsoever. But 'Umar's decision concerning *qisās* was based on the rationale that the lives of the people would be exposed to aggression if the participants in murder were exempted from *qisās*. Public interest thus dictated the application of *qisās* for all who took part in murdering a single individual. Furthermore, the third Caliph, 'Uthmān, distributed the authenticated Qur'ān and destroyed all the variant versions of the text. He also validated the right of inheritance of a woman whose husband had divorced her in order to be disinherited. The fourth Caliph, 'Ali, is also on record to have held craftsmen and traders responsible for the loss of goods that were placed in their custody. This he considered to be for the *maṣlahah* of the people so that traders take greater care in safeguarding the people's properties.¹⁶

In a similar vein, the 'ulamā of the various schools have validated interdiction of the ignorant physician, the clowning *muftī*, and the bankrupt trickster on grounds of preventing harm to the people. The Mālikīs have also authorised detention and *ta'zīr* for want of evidence of a person who is accused of a crime.¹⁷ In all these instances, the 'ulamā have aimed at securing the *maṣlahah mursalah* by following a Sharī'ah-oriented policy (*siyāsah shar'īyyah*), which is largely concurrent with the dictates of *maṣlahah*. As Ibn Qayyim has observed, "*siyāsah shar'īyyah* comprises all measures that bring the people close to beneficence (*ṣalāh*) and move them further away from corruption (*ḥasād*) even if no authority is found for them in Divine revelation, and the *Sunnah* of the Prophet."

The main support for *istislāh* as a proof and basis of legislation (*tashrīʿ*) comes from Imām Mālik who has given the following reasons in its favour:

1. That the Companions have validated it and have formulated the rules of Shariʿah on its basis.
2. When the *maṣlaḥah* is compatible with the objectives of the Lawgiver (*maqāṣid al-sharīʿ*) or that it falls within the genus or category of what the Lawgiver has expressly validated, it must be upheld. For neglecting it under such circumstances is tantamount to neglecting the objectives of the Lawgiver, which is to be avoided. That *maṣlaḥah* as such is a norm of the Shariʿah in its own right; it is by no means extraneous to the Shariʿah but an integral part of it.
3. When *maṣlaḥah* is of the genus of the approved *maṣāliḥ* and it is not upheld, the likely result would be to inflict hardship on the people, which must be prevented.¹⁹

TYPES OF MAṢLAḤAH

The *maṣāliḥ* in general are divided into three types, namely the essentials (*darūriyyāt*), the complementary (*ḥājīyyāt*), and the embellishments (*taḥsīniyyāt*). The Shariʿah, in all of its parts, aims at the realisation of one or the other of these *maṣāliḥ*. The essential *maṣāliḥ* are those on which the lives of the people depend and their neglect leads to total disruption and chaos. They consist of the five essential values (*al-darūriyyāt al-khamsah*) namely religion, life, intellect, lineage and property. These must not only be promoted but also protected against any real or likely threats which undermine their safety. To uphold the faith would thus require observance of the prescribed forms of *ʿibādāt*, whereas the safety of life and intellect is secured by obtaining lawful means of sustenance as well as the enforcement of penalties which the Shariʿah has provided so as to protect them against destruction and loss.²⁰

The *ḥājīyyāt* are on the whole supplementary to the five essential values and they refer to interests whose neglect leads to hardship in the life of the community although not to its collapse. Thus in the area of *ʿibādāt* the concessions (*rukhaṣ*) that the Shariʿah has granted to the sick, and to the traveller, not to observe the fast, and shorten the *ṣalāt*, are aimed at preventing hardship. Similarly, the basic permissibility (*ibāḥah*) regarding the enjoyment of victuals and hunting is complementary to the main objectives of protecting life and intellect.²¹

The embellishments (*taḥsīniyyāt*, also referred to as *kamāliyyāt*) refer to interests whose realisation leads to improvement and the attainment of that which is desirable. Thus the observance of cleanliness in personal appearance and *ʿibādāt*, moral virtues,

avoiding extravagance in consumption, and moderation in the enforcement of penalties fall within the scope of *tahsīniyyāt*.

It will be noted that the unrestricted *maṣlaḥah* does not represent a specific category of its own in this classification of *maṣlaḥah*, for the obvious reason that it could fall into any of the three types of *maṣāliḥ*. Should it be the case that the realisation of *maṣlaḥah mursalah* is *sine qua non* to an essential *maṣlaḥah*, then the former becomes a part of the latter. Likewise, if *maṣlaḥah mursalah* happens to be a means to attaining one of the second classes of *maṣāliḥ*, then it would itself fall into that category and so on. Furthermore, we may briefly add here the point which al-Shāṭibī has discussed at length, that the *maṣāliḥ* are all relative (*nisbī, idāfī*) and as such, all the varieties of *maṣlaḥah*, including the essential *maṣāliḥ*, partake in a measure of hardship and even *maḥsadah*. Since there is no absolute *maṣlaḥah* as such, the determination of value in any type of *maṣlaḥah* is based on the preponderance of benefit that accrues from it provided that the benefit in question is in harmony with the objectives of the Lawgiver.²²

From the viewpoint of the availability or otherwise of a textual authority in its favour, *maṣlaḥah* is further divided into three types. First, *maṣlaḥah* which the Lawgiver has expressly upheld and enacted a law for its realisation. This is called *al-maṣlaḥah al-mu'tabarah*, or accredited *maṣlaḥah*, such as protecting life by enacting the law of retaliation (*qisās*), or defending the right of ownership by penalising the thief, or protecting the dignity and honour of the individual by penalising adultery and false accusation. The Lawgiver has, in other words, upheld that each of these offences constitute a proper ground (*waṣf munāsib*) for the punishment in question. The validity of *maṣlaḥah* in these cases is definitive and no longer open to debate. The 'ulamā agree that promoting and protecting such values constitute a proper ground for legislation. The fact that the Lawgiver has upheld them is tantamount to His permission and approval of all measures, including legislation, that aim at their realisation.²³

But the *maṣāliḥ* that have been validated after the Divine revelation came to an end, fall under the second class, namely the *maṣlaḥah mursalah*. Although this too consists of a proper attribute (*waṣf munāsib*) to justify the necessary legislation, but since it has neither been upheld nor nullified by the Lawgiver it constitutes the *maṣlaḥah* of the second rank. For example, in recent times, the *maṣlaḥah* which prompted in many Muslim countries the legislation that the claim of marriage, or of ownership in real property, can only be proved by means of an official document has not been explicitly validated by the Shari'ah. The law on these points has thus upheld the unrestricted *maṣlaḥah*; more specifically it is designed to prevent a *maḥsadah*, which is the prevalence of perjury (*shahādah al-zūr*) in justifying these claims.²⁴

The third variety of *maṣlahah* is the discredited *maṣlahah*, or *maṣlahah malghā*, which the Lawgiver has nullified either explicitly or by indication that could be found in the Shari'ah. The 'ulamā are in agreement on the point that legislation in the pursuance of such interests is invalid and no judicial decree may be issued in their favour. An example of this would be an attempt to give the son and the daughter an equal share in inheritance on the assumption that this will secure a public interest. But since there is a clear *naṣṣ* in the Qur'ān (4:11) which assigns to the son double the portion of the daughter, the *maṣlahah* in this case is clearly nullified (*malghā*).²⁵

To summarise, when the Shari'ah provides an indication, whether direct or implicit, of the validity of a *maṣlahah*, it falls under the accredited *maṣālīh*. The opposite of this is *maṣlahah mulghā*, which is overruled by a similar indication in the sources. The unrestricted *maṣlahah* applies to all other cases which are neither validated nor nullified by the Shari'ah.

CONDITIONS (SHURŪṬ) OF MAṢLAHAH MURSALAH

The following conditions must be fulfilled in order to validate reliance on *maṣlahah mursalah*. These conditions are designed so as to ensure that *maṣlahah* does not become an instrument of arbitrary desire or individual bias in legislation:

1. The *maṣlahah* must be genuine (*ḥaqīqīyyah*), as opposed to a plausible *maṣlahah* (*maṣlahah wahmiyyah*), which is not a proper ground for legislation. A mere suspicion or plausibility (*tawahhum*) that a certain legislation will be beneficial without ascertaining the necessary balance between its possible benefits and harms is not sufficient. There must, in other words, be a reasonable probability that the benefits of enacting a *ḥukm* in the pursuance of *maṣlahah* outweigh the harms that might accrue from it. An example of a plausible *maṣlahah*, according to Khallāf, would be to abolish the husband's right of *ṭalāq* by vesting it entirely into a court of law.²⁶

Genuine *maṣālīh* are those which contemplate the protection of the five essential values as noted above. Protecting the faith, for example, necessitates prevention of sedition (*fitnah*) and of propagation of heresy. It also means safeguarding the freedom of belief in accordance with the Qur'ānic principle that "there shall be no compulsion in religion" (2 : 256). Similarly, safeguarding the right to live includes protecting the means which facilitate an honourable life such as the freedom to work, freedom of speech, and freedom to travel. Protecting the intellect (*'aql*) necessitates the promotion of learning and safeguards

against calamities which corrupt the individual and makes him a burden on society. Furthermore safeguarding the purity of lineage (*nasl*) entails the protection of the family and creation of a favourable environment for the care and custody of children. And, lastly, the protection of property requires defending the right of ownership. It also means facilitating fair trade and lawful exchange of goods and services in the community.²⁷

- (2) The second condition is that the *maṣlaḥah* must be general (*kullīyyah*) in that it secures benefit, or prevents harm, to the people as a whole and not to a particular person or group of persons. This means that enacting a *ḥukm* on grounds of *istiṣlāḥ* must contemplate a benefit to the largest possible number of people. It is not *maṣlaḥah* if it secures the interest of a few individuals regardless of their social and political status. The whole concept of *maṣlaḥah* derives its validity from the idea that it secures the welfare of the people at large.²⁸
- (3) And lastly that the *maṣlaḥah* is not in conflict with a principle or value which is upheld by the *naṣṣ* or *ijmā'*. Hence the argument, for example, that *maṣlaḥah* in modern times would require the legalisation of usury (*ribā'*) on account of the change in the circumstances in which it is practised—comes into conflict with the clear *naṣṣ* of the Qur'ān. The view that *ribā'* in the way it is practised in modern banking does not fall under the Qur'ānic prohibition, as Abū Zuhrah points out, violates the *naṣṣ* and therefore negates the whole concept of *maṣlaḥah*.²⁹

Imām Mālik has added two other conditions to the foregoing, one of which is that the *maṣlaḥah* must be rational (*ma'qūlah*) and acceptable to the people of sound intellect. The other condition is that it must prevent or remove hardship from the people, which is the express purpose of the Qur'ānic *āyah* in sūrah al-Mā'idah (5 : 6) as quoted above.³⁰

Furthermore, according to al-Ghazālī, the *maṣlaḥah*, in order to be valid, must be an essential *maṣlaḥah* (*al-maṣlaḥah al-ḍarūriyyah*). To illustrate this, al-Ghazālī gives the example of unbelievers taking a group of Muslims as hostages in a battle field. If the situation is such that the safety of all the Muslims and their victory necessitate killing the hostages, then al-Ghazālī permits this in the name of *al-maṣlaḥah al-ḍarūriyyah*.³¹ However the weakness of al-Ghazālī's argument appears to be that the intended *maṣlaḥah* in this example entails the killing of innocent Muslims, and the Shari'ah provides no indication to validate this.³²

AL-ṬUFĪ'S VIEW OF MAṢLAḤAH MURSALAH

Whereas the majority of jurists do not allow recourse to *istiṣlāḥ* in the presence of a textual ruling, a prominent Ḥanbalī jurist, Najm al-Dīn al-Ṭufī, stands out for his view which authorises recourse to *maṣlaḥah* with or without the existence of a *naṣṣ*. In a treatise, entitled, *Al-Maṣāliḥ al-Mursalah*, which is a commentary on the Ḥadīth that "harm is neither inflicted nor tolerated in Islam," al-Ṭufī argues that this Ḥadīth provides a clear *naṣṣ* in favour of *maṣlaḥah*. That this Ḥadīth enshrines the first and the most important principle of Sharī'ah and it enables the *maṣlaḥah* to take precedence over all other considerations. Al-Ṭufī precludes devotional matters, and specific injunctions such as the prescribed penalties, from the scope of *maṣlaḥah*. In regards to these matters, the law can only be established by the *naṣṣ* and *ijmā'*. If the *naṣṣ* and *ijmā'* endorse one another on '*ibādāt*, the proof is decisive and must be followed. Should there be a conflict of authority between the *naṣṣ* and *ijmā'*, but if it is possible to reconcile them without interfering with the integrity of either, this should be done. But if this is not possible, *ijmā'* should take priority over other indications.³³

As for transactions and temporal affairs (*aḥkām al-Mu'amalāt wa'l-siyāsiyyāt al-dunyawīyyah*) al-Ṭufī maintains that if the text and other proofs of Sharī'ah happen to conform to the *maṣlaḥah* of the people in a particular case, they should be applied forthwith, but if they oppose it, then *maṣlaḥah* should take precedence over them. The conflict is really not between the *naṣṣ* and *maṣlaḥah*, but between one *naṣṣ* and another, the latter being the Ḥadīth of *lā ḍarar wa la ḍirār fi'l-Islam*.³⁴ One must therefore not fail to act upon that text which materialises the *maṣlaḥah*. This process would amount to restricting the application of one *naṣṣ* by reason of another *naṣṣ* and not to a suspension or abrogation thereof. It is a process of specification (*takhṣiṣ*) and explanation (*bayān*) just as the *Sunnah* is sometimes given preference over the Qur'ān by way of clarifying the text of the Qur'ān.³⁵

In the areas of transactions and governmental affairs, al-Ṭufī adds, *maṣlaḥah* constitutes the goal whereas the other proofs are like the means; the end must take precedence over the means. That the rules of Sharī'ah on these matters have been enacted in order to secure the *maṣāliḥ* of the people, and therefore when there is a conflict between a *maṣlaḥah* and *naṣṣ*, the Ḥadīth *la ḍarar wa la ḍirār* clearly dictates that the former must take priority.³⁶ In short, al-Ṭufī's doctrine, as Maḥmaṣṣanī has observed, amounts to saying after each ruling of the text "provided public interest does not require otherwise."³⁷

DIFFERENCES BETWEEN *ISTIṢLĀḤ*, ANALOGY, AND *ISTIḤSĀN*

In his effort to determine the *Shar'ī* ruling of a particular issue, the jurist must first refer to the Qur'ān, the *Sunnah* and *ijmā'*. In the absence of any ruling in these sources, he must attempt *qiyās* by identifying a common '*illah*' between a ruling of the text and the issue for which a solution is wanting. However, if the solution arrived at through *qiyās* leads to hardship or unfair results, he may depart from it in favour of an alternative analogy in which the '*illah*', although less obvious, is conducive to obtaining a preferable solution. The alternative analogy is a preferable *qiyās*, or *istiḥsān*. In the event however, when no analogy can be applied, the jurist may resort to *maṣlaḥah mursalah* and formulate a ruling which, in his opinion, serves a useful purpose or prevents a harm that may otherwise occur.³⁸

It thus appears that *maṣlaḥah mursalah* and *qiyās* have a feature in common in that both are applicable to cases on which there is no clear ruling available in the *nuṣūṣ* or *ijmā'*. They also resemble one another in the sense that the benefit that is secured by recourse to them is based on a probability, or *ẓann*, either in the form of an '*illah*' in the case of *qiyās*, or of a rational consideration which secures a benefit in the case of *maṣlaḥah mursalah*. However *qiyās* and *maṣlaḥah* differ from one another in certain respects. The benefit which is secured by *qiyās* is founded on an indication from the Lawgiver and a specific '*illah*' is identified to justify the analogy to the *naṣṣ*. But the benefit which is sought through *maṣlaḥah mursalah* has no specific basis in the established law, whether in favour or against. *Maṣlaḥah mursalah* in other words stands on its own justification whereas *qiyās* is the extension of a ruling which already exists.

This explanation would also serve to clarify the main difference between *maṣlaḥah* and *istiḥsān*. A ruling which is based on *maṣlaḥah mursalah* is original in the sense that it does not follow, nor does it represent a departure from, an existing precedent. As for *istiḥsān*, it only applies to cases on which there is a precedent available (usually in the form of *qiyās*) but *istiḥsān* seeks a departure from it in favour of an alternative ruling. This alternative may take the form of a hidden analogy (*qiyās khafī*), or of an exception to a ruling of the existing law, each representing a variation of *istiḥsān*.³⁹

THE POLEMICS OVER *MAṢLAḤAH*

The main point in the argument advanced by the opponents of *istiṣlāḥ* is that the *Sharī'ah* takes full cognizance of all the *maṣāliḥ*. That the *Sharī'ah* is all-inclusive and there is no *maṣlaḥah* out the *Sharī'ah* itself. This is the view of the *Zāhirīs* and some *Shāfi'īs* like al-Āmidī and the *Mālikī* jurist, Ibn al-Hājib who do not recognise *maṣlaḥah* as a proof in its own right. They maintain that

the *maṣāliḥ* are all exclusively contained in the *nuṣūṣ*. When the Sharī'ah is totally silent on a matter, it is a sure sign that the *maṣlahah* in question is no more than a specious *maṣlahah* (*maṣlahah wahmīyah*) which offers no grounds for legislation.⁴⁰

The Ḥanafīs and the Shāfi'īs have on the other hand adopted a relatively more flexible stance as they maintain that the *maṣāliḥ* are either validated in the explicit *nuṣūṣ*, or indicated in the rationale ('*illāh*) of a given text, or even in the general objectives of the Lawgiver. Only in the presence of a textual indication can *maṣlahah* constitute a valid ground for legislation. The identification of the causes ('*ilāl*) and objectives, according to this view, entails the kind of enquiry into the '*illāh* as would be required in *qiyās*.

The main difference between this view and that of the Zāhirīs is that it validates *maṣlahah* on the basis of the rationale and the objective of the Sharī'ah even in the absence of a specific *naṣṣ*. Both these views are founded on the argument that if *maṣlahah* is not guided by the values upheld in the *nuṣūṣ* there is the danger of confusing *maṣlahah* with arbitrary desires, which might lead to corruption and *maṣṣadah*. Experience has shown that this has frequently occurred at the behest of rulers and governors who have justified their personal wishes in the name of *maṣlahah*. The way to avoid this is indicated in the Qur'ān, in sura al-Qiyāmah where we read: "Does man think that he has been left without guidance?" (75:36) The *maṣlahah* must therefore be guided by the values that the Lawgiver has upheld. Hence there is no *maṣlahah* unless it is corroborated by an indication in the Sharī'ah.⁴¹

While commenting on *istiḥsān*, al-Ghazālī writes: We know that the *maṣāliḥ* must always follow the Shar'ī indications; *istiḥsān* is not guided by such indications and therefore amounts to no more than a whimsical opinion. As for *maṣlahah mursalah*, al-Ghazālī maintains that when it is not approved by the Lawgiver, it is like *istiḥsān*.⁴² Al-Ghazālī recognises the accredited *maṣlahah*, that is when the *maṣlahah* is indicated in the *naṣṣ*. He also approves of *maṣlahah mursalah* when it is based on definite necessity, that is *maṣlahah ḍarūriyyah*. In the absence of a definite necessity, al-Ghazālī maintains that *maṣlahah* is not valid. Consequently, al-Ghazālī does not approve of the remaining two classes of the *maṣāliḥ*, namely the complementary (*ḥājīyyāt*), and the embellishments (*tahsīniyyāt*).⁴³ By making the stipulation that the *maṣlahah*, in order to be valid, must be founded on definite necessity, however, al-Ghazālī is no longer talking of *maṣlahah mursalah*, but of necessity (*ḍarūrah*) which is a different matter altogether and governed by a different set of rules.⁴⁴ It thus appears that this view only validates the type of *maṣlahah* which is referred to as *maṣlahah mu'tabarah*.

The opponents of *istiṣlāḥ* further add: to accept *istiṣlāḥ* as an independent proof of Shari'ah would lead to disparity, even chaos, in the *aḥkām*. The *ḥalāl* and *ḥarām* would be held to be applicable in some places or to some persons and not to others. This would not only violate the permanent and timeless validity of the Shari'ah but would open the door to corruption.⁵⁵

As already stated, the Ḥanafīs and the Shāfi'īs do not accept *istiṣlāḥ* as an independent proof. Al-Shāfi'ī approves of *maṣlaḥah* only within the general scope of *qiyās*, whereas Abū Ḥanīfah validates it as a variety of *istiḥsān*. This would explain why the Shāfi'īs and the Ḥanafīs are both silent on the conditions of *maṣlaḥah* as they treat the subject under *qiyās* and *istiḥsān* respectively. They have explained their position as follows: Should there be an authority for *maṣlaḥah* in the *nuṣūṣ*, that is if *maṣlaḥah* is one of the accredited *maṣāliḥ*, then it would automatically fall within the scope of *qiyās*. In the event when no such authority could be found in the *nuṣūṣ*, it is *maṣlaḥah mulghā* and would be of no account. But it would be incorrect to say that there is a category of *maṣlaḥah* beyond the scope of the *naṣṣ* and analogy to the *naṣṣ*. To maintain that *maṣlaḥah mursalah* is a proof would amount to saying that the *nuṣūṣ* of the Qur'ān and the *Sunnah* are incomplete.⁵⁶

The opponents of *istiṣlāḥ* have further argued that the Lawgiver has validated certain *maṣāliḥ* and overruled others. In between there remains the *maṣlaḥah mursalah* which belongs to neither. It is therefore equally open to the possibility of being regarded as valid (*mu'tabarah*) or invalid (*mulghā*). Since there is no certainty as to their validity, no legislation may be based on it, for law must be founded in certainty, not doubt.

In response to this, it is argued that the Lawgiver has proscribed certain *maṣāliḥ* not because there is no benefit in them but mainly because of their conflict with other and superior *maṣāliḥ*, or because they lead to greater evil. None of these considerations would apply to *maṣlaḥah mursalah*, for the benefit in it outweighs its possible harm. It should also be borne in mind that the *maṣāliḥ* which the Lawgiver has expressly overruled (i.e. *maṣāliḥ malghā*) are few compared to those which are upheld. When we have a case of *maṣlaḥah mursalah* on which no clear authority could be found in the sources, and they appear to be beneficial, they are more likely to belong to the part which is more extensive and preponderant (*kathīr, al-ghālib*), not to that which is limited and rare (*qalīl, al-nādir*).⁵⁷

The Zāhirīs do not admit speculative evidence of any kind as a proof of Shari'ah. They have invalidated even *qiyās*, let alone *maṣlaḥah*, on the ground that *qiyās* partakes in speculation. The rules of Shari'ah must be founded in certainty and this is only true of the clear injunctions of the Qur'ān, *Sunnah* and *ijmā'*. Anything

other than these is mere speculation which should be avoided.⁵⁰ As for the reports that the Companions have issued *fatwā* on the basis of their own *ra'y* which might have partaken in *maṣlaḥah*, Ibn Ḥazm is categorical in saying that "these reports do not bind anyone."⁵¹ Thus it would follow that the *Ẓāhirīs* do not accept *maṣlaḥah mursalah* which they consider to be founded on personal opinion (*ra'y*).⁵⁰

The *Mālikīs* and the *Ḥanbalīs* have, on the other hand, held that *maṣlaḥah mursalah* is authoritative and all that is needed to validate action upon it is to fulfil the conditions which ensure its propriety. When these conditions are met, *maṣlaḥah* becomes an integral part of the objectives of the Lawgiver even in the absence of a particular *naṣṣ*. Aḥmad b. Ḥanbal and his disciples are known to have based many of their *fatwās* on *maṣlaḥah*, which they have upheld as a proof of *Sharī'ah* and an instrument of protecting the faith, securing justice, and preventing *maḥṣadah*. They have thus validated the death penalty for spies whose activity violates the *maṣlaḥah* of the Muslim community. The *Ḥanbalīs* have also validated, on grounds of *maṣlaḥah*, death penalty for the propagators of heresy when protecting the *maṣlaḥah* of the community requires it. But in all this, the *Ḥanbalīs*, like the *Mālikīs*, insist that the necessary conditions of *maṣlaḥah* must be fulfilled. That *maṣlaḥah* must pursue the valid objectives of the *Sharī'ah* and the dictates of sound intellect, acting upon which fulfils a useful purpose, or serves to prevent a harm to the people.⁵¹ Some of the more far-reaching instances of *maṣlaḥah* in the *Mālikī* doctrine comprise the following:

- (1) Imām Mālik validated the pledging of *bay'ah* (oath of allegiance) to the *maḥḍūl*, that is the lesser of the two qualified candidates for the office of the Imām, so as to prevent disorder and chaos afflicting the life of the community.⁵²
- (2) When the Public Treasury (*bayt al-māl*) runs out of funds, the Imām may levy additional taxes on the wealthy so as to meet the urgent needs of the government without which injustice and sedition (*fitnah*) may become rampant.⁵³
- (3) In the event where all the means of earning a lawful living are obstructed to a Muslim; he is in a situation where he cannot escape to another place, and the only way to earn a living for him is to engage in unlawful occupations, he may do so but only to the extent that is necessary.⁵⁴

CONCLUSION

Despite their different approaches to *maṣlaḥah*; the leading 'ulamā of the four *Sunnī* schools are in agreement, in principle, on the issue that all genuine *maṣāliḥ* which do not conflict with the

objectives (*maqāṣid*) of the Lawgiver must be upheld. This is the conclusion that both Khallāf and Abū Zuhrah have drawn from their investigations.⁵⁵ The Shāfi'ī and Ḥanafī approaches to *maṣlahah* is essentially the same as that of the Mālikī and Ḥanbalī with the only difference that the former have attempted to establish a common ground between *maṣlahah* and *qiyās* which has an identifiable '*illah*. Some Mālikī jurists, including Shihāb al-Dīn al-Qarāfī have observed that all the jurists are essentially in agreement over the concept and validity of *maṣlahah mursalah*. They only differ on points of procedure; while some would adopt it directly, other would do so by bringing the *maṣlahah* within the purview of *qiyās*.⁵⁶ But Imām Mālik's concept of *maṣlahah* is the most far-reaching of the four Sunnī schools. Since *maṣlahah* must always be harmonious with the objectives of the Lawgiver, it is a norm by itself, *maṣlahah mursalah* as such specifies the general ('*āmm*) of the Qur'ān, just as the '*āmm* of the Qur'ān may be specified by *qiyās*. In the event of conflict between a genuine *maṣlahah* and a solitary Ḥadīth, the former takes priority over the latter.⁵⁷

The changing conditions of life never cease to generate new interests. If legislation were to be confined to the values which the Lawgiver has expressly decreed, the Sharī'ah is bound to fall short of meeting the *maṣāliḥ* of the community. To close the door of *maṣlahah* would be tantamount to stagnation and unnecessary restriction on the capacity of the Sharī'ah to accomodate social change. 'Abd al-Wahhāb Khallāf is right in his assessment that any claim to the effect that the *nuṣūṣ* of the Sharī'ah are all-inclusive and cater for all eventualities is simply not true. The same author goes on to say: "there is no doubt that some of the *maṣāliḥ* have neither been upheld nor indicated by the Sharī'ah in specific terms."⁵⁸

As for the concern that the opponents of *maṣlahah mursalah* have expressed that validating this doctrine would enable arbitrary and self-seeking interests to find their way under the banner of *maṣlahah*, they only need be reminded that a careful observance of the conditions that are attached to *maṣlahah* will ensure that only the genuine interests of the people which are in harmony with the objectives of the Sharī'ah would qualify. This concern is admittedly valid, but one which cannot be confined to *maṣlahah* alone. Arbitrariness and pursuit of self-seeking interests have never been totally eliminated in any society, under any legal system. It is a permanent threat which must be carefully checked and minimised to the possible extent. But this very purpose will be defeated if legislation on grounds of *istislāḥ* were to be denied validity. To combat the evil of arbitrary indulgence under the banner of *maṣlahah* would surely have greater prospects of success if the *mujtahid* and the Imām were to be able to enact the necessary legislation on grounds of preventing harm to society. Consequently the argument that the opponents of *maṣlahah* have advanced would appear to be specious and self-defeating.

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34. Ibid, p. 141; Muṣṭafā Zayd, *op. cit.*, pp. 238-240. This book is entirely devoted to an exposition of al-Ṭufī's doctrine of *maṣlaḥah*.
35. Cf. Muṣṭafā Zayd, *op. cit.*, p. 121; Abū Zahrah, *op. cit.*, p. 223. A discussion of al-Ṭufī's doctrine can also be found in Malcolm. H. Kerr, *Islamic Reform*, (Berkeley: University of California Press, 1966), p. 97 ff.
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